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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-361

In the Matter of

The Application of STEPHEN S. GOTTLIEB,

Petitioner,

—against—

PERRY B. DURYEA, JR., as Speaker of the Assembly of the State of New York; DONALD A. CAMPBELL, individually and as Clerk of the Assembly of the State of New York; and FRED F. TAYLOR, individually and as Superintendent of Mailing for the Assembly of the State of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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IN THE

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In the Matter of

The Application of STEPHEN S. GOTTLIEB,

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PERRY B. DURYEA, JR., as Speaker of the Assembly of the State of New York; DONALD A. CAMPBELL, individually and as Clerk of the Assembly of the State of New York; and FRED F. TAYLOR, individually and as Superintendent of Mailing for the Assembly of the State of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner respectfully prays that a writ of certiorari issue to review the remittitur and judgment of the Court of Appeals of the State of New York entered in this proceeding on June 1, 1972 (Appendix p. 15). A timely motion to amend the remittitur to indicate the constitutional questions necessarily considered was denied by the Court of Appeals on July 7, 1972.

Opinions Below

The opinions below are unreported. The opinion of the Supreme Court appears at page 18 of the Appendix. The opinion of the Appellate Division, Third Department appears at page 21 of the Appendix. The New York Court of Appeals rendered no opinion herein.

Jurisdiction

The remittitur and judgment of the Court of Appeals was entered on June 1, 1972. A timely motion to amend the remittitur was denied by the Court of Appeals on July 7, 1972. The jurisdiction of this Court rests upon 28 U.S.C. Section 1257(3).

Questions Presented

Whether the refusal of an employee of a state legislature to transmit the letter of an elected representative entitled by law to the franking privilege on the ground that it is "too political" raises a justiciable constitutional issue or whether it is an internal legislative matter immune from judicial review.

Whether the refusal of an employee of a state legislature to transmit the letter of an elected representative because of its political content places a prior restraint on free speech.

Whether the refusal of an employee of a state legislature, who is a patronage appointee of the opposing political party, to transmit the letter of an elected representative in the absence of any written standards governing content of franked mail is a denial of due process.

Statute Involved

The statute involved, Section 16 of the New York Legislative Law, appears in the Appendix hereto at page 24.

Statement of the Case

This civil rights action concerns a policy adopted by the Superintendent of the New York State Assembly's mailroom of censoring outgoing legislative mail.

The New York Legislative Law provides a franking privilege for all official mail of State legislators, similar to the franking privilege enjoyed by members of Congress. The Superintendent of the mailroom at the direction of the Speaker and the Clerk of the Assembly, but without statutory authority or written regulation has, however, assumed the power to inspect legislator's mail and to make *ad hoc* determinations concerning its eligibility for franked status. Pursuant to this policy he refused to transmit a letter from Assemblyman Stephen Gottlieb to four hundred of his constituents on the ground that it was "too political."

This practice is directly contrary to the Federal Rules governing the Congressional franking privilege, 39 CFR §137.92, which provide:

> "*Official mail may not be detained.* Official mail of any kind may not be detained even though there are indications of abuse of official mailing privileges. It must be promptly dispatched and delivered to the addressee. Reports of the indicated abuse must be submitted to the Bureau of Operations, Classification and Special Services Division."

"Official mail" has been defined as "that which relates to the business of the government." 17 Opinion Attorney General 183; C.J.P. 1186 note 28.

How the Federal Questions Were Raised

Assemblyman Gottlieb challenged Respondents' refusal to mail his communication to his constituents by commencing an Article 78 petition in the Albany County Supreme Court. His petition sought an immediate order compelling Respondent to mail the material in question.

The Supreme Court ruled that Respondents' refusal to mail the letters in question constituted an unlawful prior restraint upon Assemblyman Gottlieb's ability to communicate with his constituents and accordingly ordered Respondents to mail the letters in question forthwith.

Respondents filed a Notice of Appeal to the Appellate Division, Third Department which reversed Justice Hunt's decision on the ground that Respondents' refusal to mail Assemblyman Gottlieb's letter constituted an internal matter of the legislature over which the Courts could exercise no judicial review.

The New York Court of Appeals unanimously affirmed without opinion the decision of the Appellate Division. A motion made to amend the remittitur to show that constitutional questions had been heard and necessarily passed on was denied, presumably because the court was of the opinion that the question was one of internal legislative politics and therefore no constitutional issues had been raised. This refusal to decide the case raises the most serious First Amendment questions.

Although Petitioner Gottlieb is no longer a state assemblyman, having been appointed to the position of Commissioner of the New York State Liquor Authority, the case is not rendered moot since the policy and practice complained of is still in existence. The situation is similar to that in *Dunn* v. *Blumstein*, —— U.S. ——, 31 L. Ed.2d 274 where this court ruled that the case was not moot because the problem is "capable of repetition, yet evading review."

REASONS FOR GRANTING CERTIORARI

I.

The ruling below is not in accord with applicable decisions of this Court that internal acts of the Legislature are not immune from Constitutional scrutiny.

Repeated decisions of this Court have put to rest the theory that the internal workings of the legislature are totally immune from constitutional scrutiny by the courts.

In *Groppi* v. *Wisconsin*, —— U.S. ——, 30 L. Ed.2d 632 (1972), this Court held that while the power to cite and sentence for contempt of the legislature is an internal legislative matter, a court still may require that the contempt power be exercised in accordance with due process guarantees.

This Court did not accept the argument in *Powell* v. *McCormack*, 395 U.S. 491 (1969) that since Congress has the exclusive power to establish qualifications for its own members, the refusal to seat a duly elected Congressman was immune from constitutional scrutiny. On the contrary, it stated:

> "It is the province and duty of the judicial department to determine . . . whether the powers of any branch of the government, and even those of the Legislature . . . have been exercised in conformity with the Constitution; and if they have not, to treat their acts as null and void." 395 U.S. at 494.

In *Bond* v. *Floyd*, 385 U.S. 116 (1966) it was held that a State Legislature could not exercise its power to require loyalty oaths from its members so as to deprive a legislator of his First Amendment rights, and then claim the action to be an internal matter of the Legislature, immune from judicial review.

Recently, this court decided that where the doctrine of legislative immunity from judicial interference is in conflict with a constitutional provision, which provides for judicial review, the latter is controlling. *Roudebush* v. *Hartke*, —— U.S. ——, 31 L. Ed.2d 1 (1972).

Only two months ago in *Gravel* v. *U. S.*, 40 U.S.L.W. 5053 (29 June 1972), this court held that the Speech and Debate Clause did not protect a legislator or his aide from having to testify before a grand jury on matters that were not strictly legislative. The case here is much stronger than the *Gravel* case, since the protections of Speech and Debate Clause do not extend to State Legislators and *Gravel* was claiming protection from criminal rather than constitutional inquiry, but the point is still made that even United States Senators and Representatives have extremely limited immunity from judicial scrutiny of their actions.

These decisions simply restate a basic principle of American law, namely that no act of any government official or employee is ever immune from Constitutional review.

Courts always have the power to interfere when Constitutional questions are raised.

In the case at hand no one questions the power of New York's Legislature to run its own mailroom but we do contend that that power, like all other powers possessed by legislative officials, is subject to the Constitution. The power to run the mailroom means the power to run the mailroom in a constitutional manner, and this Court has explicitly ruled that unconstitutional acts of legislative employees are judicially reviewable, even when such acts involve the Legislature's internal affairs.

In this case, the failure of the judiciary to intervene would have the disastrous consequence of granting the majority party, in a State Legislature the power to censor the opinions of minority party representatives.

Not only do Legislators not lose their right to free speech upon being elected to public office, but an affirmative duty is placed on them to communicate their opinions to the people whom they represent.

As this Court said in *Bond* v. *Floyd, supra* at 136:

> "Legislators have an obligation to take positions on controversial political questions so that their constituents can be fully informed by them and be better able to assess their qualifications for office; also, so they may be represented in government debates by the person they have elected to represent them."

At stake here is not only individual First Amendment rights, but also the value of an informed electorate and the democratic system in which minority views are respected and protected. Only the courts have the power to preserve these rights from destruction through political opportunism.

II.

The refusal to transmit the letter violated petitioner's First Amendment rights.

Respondents in this case have instituted a system of prior restraints on legislative communications by refusing to frank and send letters they find offensive for whatever reason.

It is, of course, no longer open to serious question that, except in the most critical emergencies, the First Amendment absolutely bars the imposition of prior restraint upon the free and open dissemination of information. *New York Times Company* v. *United States*, 403 U.S. 713 (1971).

For more than sixty years, this Court has reaffirmed the ban on Government pre-censorship of information. Mr. Justice Holmes, writing for this Court in *Patterson* v. *Colorado*, 205 U.S. 456 (1907) recognized that:

> "the main purpose of such constitutional provisions [the First Amendment] is 'to prevent all such previous restraints upon publications as had been practiced by other governments'" 205 U.S. at 462.

In *Near* v. *Minnesota*, 283 U.S. 697 (1931), Chief Justice Hughes, in a landmark decision, ruled that an injunction against the publication of a newspaper constituted an unlawful prior restraint. In the forty years since *Near* v. *Minnesota*, this Court has time and time again reiterated that prior restraints are anathema to the proper functioning of a democratic society. E.g., *Grosjean* v. *American Press Company*, 297 U.S. 233 (1936); *Lovell* v. *Griffin*, 303 U.S. 444 (1938); *Niemotko* v. *Maryland*, 340 U.S. 268

(1951); *Kunz* v. *New York,* 340 U.S. 290 (1951); *Staub* v. *City of Baxley,* 355 U.S. 313 (1958).

In the case at hand, not only is there no compelling reason for the prior restraint on legislators' speech, but there is no reason at all for it, since the legislature has the eminently adequate *post hoc* remedy for abuse of the franking privilege of suing for return of postage or, in extreme cases, filing charges of fraud against an offender. This is how the Federal franking procedure works.

There have been cases in which this court has held that in the case of material alleged to be obscene the Postmaster General might detain it for a very short period pending a hearing. Petitioner's case is clearly distinguishable from these, but even assuming that some delay in mailing were authorized to provide time for a hearing, it is well-established that the time must be of only the shortest duration. *Freedman* v. *Maryland,* 380 U.S. 51 (1965); *Kingsley Books, Inc.* v. *Brown,* 354 U.S. 436 (1957).

A case decided by this Court only a year ago, *Blount* v. *Rizzi,* 400 U.S. 410 (1971), should be dispositive of this issue.

The plaintiffs in *Blount* challenged the constitutionality of 39 U.S.C. §4006 (1964) (now 39 U.S.C. §3006), and implementing regulations, which together authorized the Postmaster General to refuse delivery of letters to persons who had been found after a "trial type" administrative hearing to have used the mails for the sale of "obscene matter." The Court struck down that "administrative censorship scheme" because the statute contained "no statutory provision requiring governmentally initiated judicial participation in the procedure which bars the magazines from the

mails, or even any provision assuring prompt judicial review" (27 L. Ed.2d at 504). It follows *a fortiori*, that the administrative censorship scheme challenged herein, which does not require or authorize even an *administrative* hearing, whether prior or subsequent to the detention of the mail, is unconstitutional.

The plaintiffs in *Blount* also challenged the constitutionality of 39 U.S.C. §4007 (1964) (now 39 U.S.C. §3007). That section authorized the federal district courts to issue preliminary injunctions to detain mail addressed to the purveyor of allegedly obscene matter until the "conclusion of the statutory [§4006] proceedings and any [administrative] appeal therefrom" (27 L. Ed.2d at 502). Such injunctions could be issued only "upon a showing of probable cause to believe" that the subject matter of the §4006 administrative hearing was obscene (*id.*). This Court held, again unanimously, that §4007 was unconstitutional because even though it required judicial authorization for the interference with the mails, it did not require a judicial determination that the mail matter was obscene, only that it was "probably" obscene, and because the statute placed on the citizen, not on the government, the burden of initiating a final judicial determination on the merits of the allegation of obscenity. Again, it follows *a fortiori* that if, absent provision for a mandatory and prompt judicial determination of the merits, a federal court cannot even temporarily interfere with the mail rights of a citizen whom the court has probable cause to believe is using the mails to sell obscene matter, certainly Respondents, acting without any judicial authorization, cannot interfere with the mail rights of a legislator whom *they* believe is using the mails to transmit "nonofficial" or "too political" mail.

Contrary to the holding of the Appellate Division the fact that petitioner was not entirely silenced, that he could have paid the considerable postage personally, and mailed his letters himself, does not remedy the constitutional infirmity of Respondents' actions. This Court has long held that the "power to tax the exercise of a privilege is the power to control or suppress its enjoyment." *Murdock* v. *Pennsylvania,* 319 U.S. 105, 112 (1943). This was the holding by this Court in a case very similar to appellant's, *Hannegan* v. *Esquire,* 327 U.S. 146 (1946). There the Postmaster General refused to grant "Esquire" magazine a second class mailing permit on the grounds that while it was not so obscene as to be unmailable, it did not "contribute to the public good and the public welfare" which he interpreted the statute to require as a precondition to receiving a second class permit. This court held that the Postmaster General could not charge a higher postage rate to publications he did not consider worthy than the rate he charged than those he approved of. The publishers of "Esquire," under the Postmaster General's ruling, could still have sent out their magazine, but they would have had to do so at their own expense without the government subsidy to which they were entitled by statute. This Court, however, found that scheme an impermissible burden on free speech. Similarly in Appellant's case the denial of the franking privilege is as effective a burden on his ability to communicate with his constituents as an absolute prohibition, and therefore a prior restraint.

III.

Censorship of the letter by an interested party in the absence of any written standards violated petitioner's right to due process.

Even if some form of censorship of Legislators' franked mail were permissible, the Legislature would still have to provide objective written standards bearing a rational relationship to the evil sought to be avoided, rather than simply leaving it up to an administrator to censor whatever displeased him.

Time and again, this Court has refused to tolerate a delegation of overbroad discretion to an administrative official in the area of the First Amendment.

In *Hannegan* v. *Esquire, supra,* this Court held that the Postmaster General had not been given the power to judge what literature was valuable or worthy, saying that to give him such power to supervise the tastes of the reading public would be a "radical departure" from our traditions. In *Lamont* v. *Postmaster General,* 381 U.S. 301 (1965) this Court held that Congress might not "set up regimes of censorship . . . by setting administrative officials astride the flow of mail to inspect it [and] appraise it . . ." 381 U.S. at 306. *Cox* v. *Louisiana,* 379 U.S. 536 (1965); *Thornhill* v. *Alabama,* 310 U.S. 88 (1940).

The requirement of specific standards to govern administrative activity touching the First Amendment is designed to minimize the danger of discriminatory treatment in the sensitive area of communication of ideas.

As presently administered, the system of "spot checking" legislators' mail, because of its total lack of precision,

is an open invitation to discriminatory and uneven treatment. In the absence of concrete guidelines, respondents may not continue to censor legislators' mail. E.g., *Kunz* v. *New York,* 340 U.S. 290 (1951); *Niemotko* v. *Maryland,* 340 U.S. 268 (1951).

In order to satisfy minimal constitutional standards, any system of reviewing legislators' mail must not only be governed by objective standards, it must also be entrusted to individuals who are beholden to no partisan interest, rather than to the Speaker of the Assembly and his patronage appointees. It is clearly impermissible for Respondents as representatives of the majority party, to sit in judgment on the propriety of the communications sought to be mailed by members of the minority party. As interested partisans they are disqualified from sitting as judges in their own case.

In *In re Murchison,* 349 U.S. 133 (1955), this Court refused to permit a judge to sit in a case in which he had even the appearance of an interest. The Court stated:

> "Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.'"

It certainly does not "satisfy the appearance of justice" to permit partisan representatives of the majority party to pass judgment upon mail which minority party representatives seek to send to their constituents. See also, *Tumey* v. *Ohio,* 273 U.S. 510 (1927); *Mayberry* v. *Pennsylvania,* 400 U.S. 455 (1971).

CONCLUSION

For the reasons stated above *certiorari* should be granted.

Respectfully submitted,

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APPENDIX

Remittitur and Judgment of the New York Court of Appeals

COURT OF APPEALS

STATE OF NEW YORK, *ss.*:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 1st day of June in the year of our Lord one thousand nine hundred and seventy-two, before the Judges of said Court.

WITNESS,

The HON. STANLEY H. FULD,
Chief Judge, *Presiding.*

RAYMOND J. CANNON,
Clerk.

REMITTITUR June 1, 1972.

No. 122.

In the Matter of the Application of

STEPHEN S. GOTTLIEB & ano.,

Appellants,

—v.—

PERRY B. DURYEA, JR., as Speaker of the Assembly of the State of New York, & ors., &c.,

Respondents.

BE IT REMEMBERED, That on the 14th day of March in the year of our Lord one thousand nine hundred and seventy-

two, Stephen S. Gottlieb & ano., the appellants in this cause, came here unto the Court of Appeals, by Burt Neuborne and Bruce J. Ennis, their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And Perry B. Duryea, Jr., as Speaker of the Assembly of the State of New York, & ors., &c., the respondents in said cause, afterwards appeared in said Court of Appeals by Louis J. Lefkowitz, Attorney General.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Eve Cary, of counsel for the appellants, and by Mr. Douglas S. Dales, Jr., of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, without costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be

enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON,
Clerk of the Court of Appeals
of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, June 1, 1972.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON,
Clerk.

[SEAL]

Opinion of the Supreme Court, Albany County

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF ALBANY

In the Matter

of

The Application of STEPHEN S. GOTTLIEB and PETER ROSENSTEIN,

Petitioners,

against

PERRY B. DURYEA, JR., as Speaker of the Assembly of the State of New York; DONALD A. CAMPBELL, individually and as Clerk of the Assembly of the State of New York; and FRED F. TAYLOR, individually and as Superintendent of Mailing for the Assembly of the State of New York,

Respondents.

At Albany County Special Term, May 28, 1971; No. 231.

Appearances:

For application: Burt Neuborne & Bruce J. Ennis, Esqs., Attorneys for petitioners.

In opposition: Hon. Louis J. Lefkowitz, Attorney General of the State of New York, Attorney for respondents.

HUNT, J.

The petitioner Gottlieb, an assemblyman from the 71st Assembly District, seeks to compel the defendants to comply with Legislative Law, section 16, and "prepay the postage on all official mail deposited in the post office" of the assembly "for transmission through the mails by members of the . . . assembly . . . . ."

It is alleged in a first cause of action that under date of May 17, 1971, the assemblyman offered to the respondent Taylor, the postmaster, for mailing, 450 copies of a letter to constituents respecting legislation pending before the legislature. The respondents returned the letters stating that they were "too political" and would not be mailed. Other causes of action are attempted to be pleaded but there is a failure to allege plain and concise statements of the facts upon which they depend (CPLR Art. 30).

The respondents illegally required the petitioner Gottlieb's mail matter to be deposited unsealed before it would be considered for granting the privilege given to all assemblymen under the statute. This object in this was to enable the respondents to inspect the letters for material they considered objectionable. After the inspection of the letters herein the conclusion was made by the respondents that such was objectionable from the viewpoint of the majority party as represented by the respondents in that the latter's legislative program was criticized therein, and, thereupon, they repressed the mailing and arbitrarily denied the privilege of the statute and refused to comply therewith. Under the allegations of the petition, it is plain that the repression of the mail matter was practiced by the majority party against the minority party in violation of the law and equal treatment under the statute. Accidental inequality is one thing, intentional and systematic discrimination is another and a denial of equal

protection of the law (*State Const.* Art. 1, Sec. 11; *U. S. Const.* Amend. 14, sec. 1; *WHYY Inc.* v. *Borough of Glassboro et al.*, 393 U.S. 117; *Posner* v. *Rockefeller*, 31 A D 2d 352) and is illegal. The Federal Constitution, first amendment, and the State Constitution, article 1, section 8, condemn repression and the prior restraint upon the exercise of freedom of speech. Such freedom is necessary to the enjoyment of the benefits of a free society and indispensable to political freedom. In aid thereof is Legislative Law, section 16.

The communications between the legislative representative herein and his constituents related to his office and his official duties and fall within the meaning of the statute and the defendants may not delay, interfere with or hinder the transmission thereof. The postmaster, under the official procedure in the Assembly, has the duty to transmit the mail (*Clerk's Manual of the Legislature*, p. 410; *Legislative Law*, section 15).

The respondents, without answering, move pursuant to CPLR 3211 for dismissal upon the ground that cause of actions are not stated. Upon such motion the allegations of the first cause of action and the reasonable inferences to be drawn therefrom are taken as true and pursuant to CPLR 3211 summary judgment upon the first cause of action is granted to the petitioner. The other causes pleaded are dismissed as insufficient, without prejudice. The petitioner Rosenstein is not found to be an aggrieved party. All papers to the attorneys for the petitioner Gottlieb to submit order for judgment.

Dated: Albany, New York, June 17, 1971.

RUSSELL G. HUNT,
Justice of Supreme Court.

Opinion of the Appellate Division, Third Department

SUPREME COURT

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT

December 15, 1971

In the Matter

of

STEPHEN S. GOTTLIEB, *et al.*,

Respondents,

—v.—

PERRY B. DURYEA, JR., as Speaker of the Assembly of the State of New York, *et al.*,

Appellants.

Appeal from a judgment of the Supreme Court at Special Term, entered July 19, 1971 in Albany County, in favor of respondent Gottlieb in an article 78 proceeding.

The petition sets forth four causes of action. The first contains averments as to Exhibit "A", a letter from respondent Gottlieb, a Member of the Assembly, addressed to approximately 450 of his constituents, the refusal to mail same by or on authority of appellants on the ground that same was "too political" and the lack of standards for determining whether items of mail are covered by section 16 of the Legislative Law; the second, the unequal maximum mailings permitted to minority and majority party Members of the Assembly; the third, the unequal use

of printing and reproduction services allowed to said Members; and the fourth, the disparity regarding the use of television studio, film and taping services. Upon return thereof, appellants moved to dismiss the petition upon the grounds that it failed to state a cause of action and that the court had no jurisdiction of the subject matter. Special Term rendered a decision stating: "summary judgment upon the first cause of action is granted to the petitioner. The other causes pleaded are dismissed as insufficient, without prejudice. The petitioner Rosenstein is not found to be an aggrieved party."

The sole decretal paragraph in the judgment, which referred to the decision of Special Term reads "ORDERED, ADJUDGED AND DECREED, that judgment be entered in favor of the petitioner Stephen S. Gottlieb, and against the respondents, directing respondents immediately to seal, stamp and mail Exhibit 'A' to the complaint herein, and further directing respondents to seal, stamp and mail all mail deposited in the post office of the assembly, and to cease and desist from subjecting such mail to any prior restraint or censorship". The record reveals no other judgment or order entered upon said decision nor any cross appeal from the judgment entered by respondents. The disposition regarding the first cause, therefore, is the only one before us for review.

The fundamental constitutional principle of the separation of powers among the three departments of government is included by implication in the pattern of government adopted by the State of New York (*Matter of LaGuardia* v. *Smith*, 288 N. Y. 1, 5-6), it being a basic part of the organic law that each department should be free from interference, in the discharge of its own functions and peculiar duties, by either of the others (*Matter of*

Davies, 168 N. Y. 89, 101-102; *People ex rel. Burby* v. *Howland*, 155 N. Y. 270, 282). The grievance alleged in the first cause of the petition is an internal matter to be handled within the procedures of the Legislature. The courts should not review every internal dispute between its members since, to do so, would frustrate the legislative process and violate said constitutional principle. This is not a case of an overriding constitutional question, as in *Powell* v. *McCormack* (395 U. S. 486) and *Bond* v. *Floyd* (385 U. S. 116), wherein the internal administration of a legislative body was not in issue. We do not view this as a case of prior restraint or infringement of free speech since petitioner Gottlieb was free to use the mails, the question here being, rather, whether he could, under the legislative framework, expend public money for said purpose (see Legislative Law, § 16). Under the facts of this case, the first cause of action as set forth in the petition should be dismissed.

Judgment reversed, on the law, and motion for dismissal as to the first cause of action set forth in the petition granted, with judgment to be entered accordingly, without costs.

Reynolds, J. P., Staley, Jr., Greenblott, Cooke, and Simons, JJ., concur.

Statute Involved

New York Legislative Law, § 16. *Supplies furnishe by secretary and clerk*

The secretary of the senate and the clerk of th assembly, respectively, shall purchase all stationery, offic supplies and equipment necessary for the official use o the members, officers, employees and reporters, and sha prepay the postage on all official mail deposited in the pos office of the respective houses for transmission throug the mails by members of the senate and assembly, respe tively. The respective secretary or clerk of each hous shall, subject to the approval of the comptroller, purchas such furniture, equipment and supplies as may be necessar for the house of which he is an officer.

Letter of Stephen Gottlieb

THE ASSEMBLY
(SEAL) STATE OF NEW YORK
ALBANY

STEPHEN S. GOTTLIEB
71st District
New York County
Community Office
4149 Broadway
New York, N. Y. 10033
WA 3-9585

May 13, 1971

Dear Constituent:

As the current Legislative Session enters its final days, I feel that it is essential to let you know what I and the other Democratic members of the Legislature are doing to prevent the Governor and the conservative Republicans from destroying our City and its overburdened population.

I, of course, voted *against* the drastic budget reductions which so severely cut funds for Medicaid, Mental Hygiene, CUNY, public education, and other humane needs. I made a speech on the floor of the Assembly at 4 a.m. during the budget debates of April 1st and 2nd appealing to the Republican majority *not* to cut the three million dollars earmarked for housing code enforcement in the City. My pleas were made to deafened ears! Without these funds those of us in rent controlled apartments will be getting even less satisfaction from the Rent Commission.

In an effort to defeat Rockefeller's attempt to destroy rent control completely, I have joined with my liberal

Democratic colleagues to arouse public pressure against the Governor's rent bills. If these bills are passed, any apartment which becomes vacant would be de-controlled—an incentive to landlords to harass tenants to force them to move. In addition, rents would be increased in controlled units as the landlord would be allowed to pass directly to the tenant utility, fuel, and tax increases.

I have met with hundreds of you from my district in the last two weeks to discuss the budget and tenant problems, and I will speak out forthrightly on the issues vital to our community.

In the days that remain I shall fight of the restoration of funds in the Supplemental Budget so that New York City will be able to move *ahead* in the fight against narcotics, for better public education, for adequate housing, and for the maintenance of the services necessary for the health and safety of our citizens!

If there is any particular piece of legislation which may be of interest to you, please feel free to contact me at my New York office or write to me at the State Capitol, Albany, New York, and I will do whatever I can to be of service to you.

Sincerely,

STEPHEN S. GOTTLIEB
STEPHEN S. GOTTLIEB
Member of Assembly

COPY

FILED
OCT 2 1972
MICHAEL RODAK, JR., CLERK

(191-C)

IN THE

Supreme Court of the United States

October Term, 1972

No. ~~72361~~ 72-361

In the Matter of

The Application of STEPHEN S. GOTTLIEB,
Petitioner,

against

PERRY B. DURYEA, JR., as Speaker of the Assembly of the State of New York; DONALD A. CAMPBELL, individually and as Clerk of the Assembly of the State of New York; and FRED F. TAYLOR, individually and as Superintendent of Mailing for the Assembly of the State of New York,

Respondents.

BRIEF IN OPPOSITION TO PETITION

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Attorney for Respondents

RUTH KESSLER TOCH
Solicitor General

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Assistant Attorney General
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BRIEF IN OPPOSITION TO PETITION

This litigation began as a proceeding to review and enjoin alleged discriminatory practices of the New York Assembly. The petition averred, *inter alia*, that the respondents refused to mail copies of a letter addressed by then Assemblyman Stephen S. Gottlieb to some of his constituents upon the ground that such letters were too political to be mailed at public expense. Petitioner Gottlieb has ceased to be an Assemblyman since commencement of the proceeding and is presently a Commissioner of the New York State Liquor Authority.

Upon appeal to the New York State Appellate Division, Third Judicial Department, that Court dismissed the petition stating in 38 AD 2d 634, at 635, as follows:

"The fundamental constitutional principle of the separation of powers among the three departments of government is included by implication in the pattern of government adopted by the State of New York (*Matter of LaGuardia* v. *Smith*, 288 NY 1, 5-6), it being a basic part of the organic law that each department should be free from interference, in the discharge of its own functions and peculiar duties, by either of the others (*Matter of Davies*, 168 NY 89, 101-102; *People ex rel. Burby* v. *Howland*, 155 NY 270, 282). The grievance alleged in the first cause of the petition is an internal matter to be handled within the procedures of the Legislature. The courts should not review every internal dispute between its members since, to do so, would frustrate the legislative process and violate said constitutional principle. This is not a case of an overriding constitutional question, as in *Powell* v. *McCormack* (395 US 486) and *Bond* v. *Floyd* (385 US 116), wherein the internal administration of a legislative body was not in issue. We do not view this as a case of prior restraint or infringement of free speech since petitioner Gottlieb was free to use the mails, the question here being, rather, whether he could, under the legislative framework, expend public money for said purpose (see Legislative Law, § 16). Under the facts of this case, the first cause of action as set forth in the petition should be dismissed."

The New York Court of Appeals unanimously affirmed, without opinion, on June 1, 1972. A motion by Petitioner to amend the remittitur to reflect that a Constitutional question was presented and necessarily decided was denied on July 7, 1972.

The decision of the Appellate Division and the affirmance thereof by the Court of Appeals are properly predicated upon the doctrine of the separation of powers among the three coordinate branches of government and the Courts' reluctance to interfere with the internal affairs of the legislative branch, a question relating solely to New York State law.

This petition should be denied upon the authority of *Doremus* v. *Board of Education*, 342 U. S. 429 (1952). The Petitioner is no longer a legislator of the State of New York. The matter is, therefore, moot. Moreover, no direct injury to the Petitioner can be demonstrated, in view of his changed circumstances. He is, consequently, seeking an advisory opinion from this Court, long since settled as being beyond the scope of a *bona fide* case or controversy. *Flast* v. *Cohen*, 392 U. S. 83, 95 (1967); *Sierra Club* v. *Morton*, 405 U. S. 727 (1972).

Further, denial of the petition is mandated by *Herb* v. *Pitcairn*, 324 U. S. 113 (1944) and *Department of Mental Hygiene* v. *Kirchner*, 380 U. S. 194 (1965). The decision of the Appellate Division in 38 AD 2d 634, 635, quoted *supra*, rested expressly upon adequate and independent State grounds. The refusal by the New York Court of Appeals to amend the remittitur as requested by Petitioner is a reiteration by it of the lack of any Federal Constitutional question. In short, the entire matter is undoubtedly a question of New York State law.

The Petition for Certiorari Should be Denied

Dated: September 27, 1972.

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of New York
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